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Report of the Working Group on Enforced or Involuntary Disappearances on enforced disappearances in the context of migration

Note by the Secretariat

The Secretariat has the honour to transmit to the Human Rights Council the report of the Working Group on Enforced or Involuntary Disappearances on enforced disappearances in the context of migration, submitted in accordance with Council resolution 27/1.

In the report, the Working Group asserts that the phenomenon of enforced disappearance of migrants is a modern-day reality that should urgently be given adequate attention. The increasingly precarious movements of migrants undertaking long, perilous journeys, associated with often increasingly rigid migratory policies of States, have created a situation which exposes them to heightened risks of becoming victims of human rights violations, including enforced disappearances.

As outlined in the report, there is a direct link between migration and enforced disappearance, either because individuals leave their country as a consequence of a threat or risk of being subjected to enforced disappearances there, or because they disappear during their journey or in the country of destination. Disappearances take the form of abduction for political or other reasons, or occur in the context of detention or deportation processes or as a consequence of smuggling and/or trafficking.

The Working Group also analyses the factors that contribute to the enforced disappearances of migrants and outlines States' obligations in this context, and offers conclusions and recommendations.

The Working Group concludes that States and the international community as a whole do not seem to be giving the necessary attention to this issue. However, owing to both the gravity and the complexity of this phenomenon, it is essential that each State take the problem seriously and, as a matter of priority, strengthen measures to prevent and combat it, both at the national level and — given its transregional character — the international level, through enhanced cooperation with other States as well as relevant international organizations at the regional or global level.

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The examples mentioned in the report are drawn from cases received by the Working Group — either outstanding or clarified — that have been included in its reports, other public reports by United Nations agencies or other international organizations, or information received from the experts participating in a meeting held on the sidelines of the Working Group's 111th session, held in Seoul in February 2017.

Report of the Working Group on Enforced or Involuntary Disappearances on enforced disappearances in the context of migration*

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* Circulated in the language of submission only.

I. Enforced disappearances in the context of migration

1. Disappearances of migrating individuals in transit and once arrived in the destination countries are increasingly being documented by State institutions, non-governmental organizations and the media.

2. During its 105th session, and in its 2015 annual report,[1] the Working Group on Enforced or Involuntary Disappearances announced that it would address diverse forms of enforced disappearances in the context of migration to determine the cause of the problem and to specify the obligations of the States to assist the victims.

3. A number of preliminary observations were already included in its 2016 annual report.[2] On 5 February 2017, an expert meeting was held in Seoul, on the sidelines of the 111th session of the Working Group. In addition, a number of written contributions were received from various stakeholders, including States in response to a questionnaire sent in December 2016.[3] The Working Group is grateful to the experts who participated in the meeting as well as to the States, United Nations agencies, non-governmental organizations and individuals who contributed to this process.

4. The present report focuses on enforced disappearances of persons in the context of migration and also examines other relevant similar practices undertaken by private actors in the context of migration, including acts of human trafficking or smuggling of migrants, which could be tantamount to enforced or involuntary disappearances.

5. While there is no universally recognized definition of the concept of migrant, the Working Group will define it as "any person who is outside a State of which he or she is a citizen or national, or, in the case of a stateless person, his or her State of birth or habitual residence".[4] Accordingly, for the purpose of the present study, the Working Group considers migrants to encompass asylum seekers and refugees, as well as persons who migrate for economic, labour, climatic or other reasons.[5]

6. The following issues will be analysed hereinafter:

(a) Migration caused by enforced disappearances;

(b) Enforced disappearances of migrants;

(c) Factors contributing to the enforced disappearance of migrants;

(d) State obligations surrounding the enforced disappearance of migrants.

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[1] A/HRC/30/38.

[2] See A/HRC/33/51, paragraphs 46 and ff.

[3] The responding States were El Salvador, Germany, Ireland, Japan, Kazakhstan, Mexico, Morocco, Portugal, Serbia, Sweden and Venezuela. Written contributions were also received from the following organizations: Groupe antiraciste de défense et d'accompagnement des étrangers et migrants, Fundación para la Justicia y el Estado Democrático de Derecho, Regional Mixed Migration Secretariat, and Alternative Espace Citoyen. Kimio Yakushiji, on behalf of the Committee on Enforced Disappearances, also contributed.

[4] Office of the United Nations High Commissioner for Human Rights (OHCHR), *Recommended Principles and Guidelines on Human Rights at International Borders* (Geneva, 2014), introduction, para. 10. Available at www.ohchr.org/Documents/Issues/Migration/OHCHR_Recommended_Principles_Guidelines.pdf. See also E/CN.4/2000/82, para. 36.

[5] See, for example, www.unhcr.org/en-us/mixed-migration.html. See also International Organization for Migration (IOM), *Glossary on Migration* (Geneva, 2004), available from www.iomvienna.at/sites/default/files/IML_1_EN.pdf. This working definition is without prejudice to the specific rights accorded to specific groups of people on the move, such as refugees, under international law.

A. Migration caused by the phenomenon of enforced or involuntary disappearances

7. While many cases of enforced disappearance occur during the migration process (whether in transit or in the State of destination), at the same time the fear of being subjected to an enforced disappearance can also be a reason to migrate. In addition, relatives of disappeared individuals may migrate to continue the search for their loved ones and to pursue justice.

1. Migration to escape threats of being subjected to enforced disappearance

8. Throughout the fulfilment of its mandate, the Working Group has encountered numerous instances of persons who migrated to other countries to flee the threat of being subjected to an enforced disappearance.[6] Similar cases have been documented more recently by civil society organizations all over the globe.

9. The Working Group wishes to recall that enforced disappearances or threats thereof constitute a form of persecution falling within the scope of the well-established international law principle of non-refoulement. Accordingly, persons who migrate to flee such actions should be entitled to asylum or refugee status and should not be the subject of refoulement (see paragraphs 25 and 59-61 below).

10. As the Working Group has repeatedly indicated, the disappearance of an individual can have devastating consequences on the family, especially women and children, as it often results in psychological trauma, social exclusion, and increased poverty or economic deprivation.[7] The loss of the family breadwinner or head of household may, for example, force the remaining members of the family to migrate in search of better living conditions, or in an attempt to rebuild their lives.

2. Migration in search of truth and justice

11. Relatives of disappeared people or human rights defenders may also decide to migrate because of their battle against enforced disappearances or their search for truth and justice.[8]

12. In some cases, relatives of disappeared migrants also move internally, temporarily or permanently, or in the country of destination of their loved one, to seek more information, as they face many obstacles searching for the disappeared in their own country.[9]

13. Migration may also be triggered because individuals and organizations are often threatened, harassed and criminalized for their work.[10] They can also be subjected themselves to arbitrary detention and arrest, as well as verbal, physical and sexual harassment and violence, including enforced disappearance.[11] In many cases, individuals in this situation would be entitled to claim asylum under international refugee law.

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[6] Into this category fall the cases of many individuals fleeing Argentina, Chile and other Latin American States where enforced disappearances were common in the 1970s and 1980s. See, for example, E/CN.4/1984/21, para. 102. See also E/CN.4/1492, annex VIII, paras. 1 and 2.1 and annex IX, p. 5.

[7] See A/HRC/30/38/Add.5, paras. 23-32.

[8] See, for example, E/CN.4/1985/15, para. 135. See also A/HRC/30/38/Add.5, paras. 33-41.

[9] See, for example, IOM, *Fatal Journeys: Tracking Lives Lost During Migration* (Geneva, 2016), p. 36. See also Fundación para la Justicia y el Estado Democrático de Derecho, *Disappeared Migrants: The Permanent Torture* (Mexico, D.F., 2014), p. 8, available at http://fundacionjusticia.org/cms/wp-content/uploads/2014/09/Disappeared-migrants.pdf.

[10] See the general comment on the right to the truth in relation to enforced disappearance adopted by the Working Group in 2010 (see A/HRC/16/48) and the study on enforced disappearances and economic, social and cultural rights (see A/HRC/30/38/Add.5, paras. 33 ff).

[11] See, for example, E/CN.4/1995/36, para. 219; A/HRC/13/31 and Corr.1, para. 268; and A/HRC/19/58/Rev.1, para. 446. See also A/HRC/33/67, para. 73; and Council of Europe, Commissioner for Human Rights, *Missing Persons and Victims of Enforced Disappearance in Europe*, Issue Paper (2016), pp. 7, 21 and 32.

B. Enforced disappearances of migrants

14. Enforced disappearances of migrants can occur for many reasons. They can have a political purpose, may occur during processes of detention or deportation, or be a consequence of smuggling and/or trafficking.

1. Enforced disappearance as a result of the abduction of migrants for political or other reasons

15. The Working Group has encountered several instances of individuals subjected to enforced disappearances while in transit in another country or in the country to which they had migrated for political or other reasons.

16. In some instances, victims have been captured by agents of the State of origin in the territory of the transit or the destination State, with the authorization or complicity of the latter. This modus operandi often includes the provision of intelligence by the transit or destination State to the State of origin so that "political" migrants can be located within the host State's territory. There have also been instances in which victims have been captured by agents of the transit or destination State and then transferred to the authorities of the victims' State of origin. This modus operandi may also include exchange of intelligence or inter-State cooperation as described previously.

17. Some of the best-known examples of such cooperation occurred in the 1970s and 1980s when military regimes in South America coordinated their actions in what is known as "Operation Condor" in order to capture a number of their nationals who had fled abroad to escape persecution.[12] More specifically, the Working Group received information concerning the alleged arrest, detention and ill-treatment of Uruguayan refugees in Argentina by either or both Argentine and Uruguayan military and security personnel, or by groups composed partly of those forces, between 1974 and 1980.[13] In some cases, the victims were transferred to Uruguay and, in other cases, they were interrogated by Uruguayan personnel in Argentine facilities.[14] Several of these individuals were ultimately forcibly disappeared.[15]

18. This type of disappearance has also allegedly occurred in other parts of the world. Indeed, the Working Group has received information about cases of disappearance of Afghan nationals with refugee status in Pakistan who were abducted in 1986 and between 1989 and 1991 by persons reportedly acting on behalf of the Government of Pakistan.[16] Similarly, in 1994, the Working Group expressed its concern to the Government of Kazakhstan regarding cases of alleged disappearances of Uzbek nationals living as refugees in Kazakhstan who were reportedly abducted by agents of Uzbekistan.[17] Similarly, the Working Group has also received a number of cases of Egyptian individuals who were allegedly captured in the United Arab Emirates and sent back to Egypt by the authorities.[18]

19. More recently, the Working Group received information concerning disappeared nationals of the Democratic People's Republic of Korea who had crossed the border into China to avoid persecution and were reportedly captured by Chinese officials and

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[12] See, for example, E/CN.4/1983/14, paras. 91-92.

[13] See E/CN.4/1435, para. 152.

[14] Ibid., para. 173.

[15] See E/CN.4/1985/15, para. 236. Other similar cases received by the Working Group include that of a Uruguayan citizen who was allegedly arrested in Paraguay, taken to Argentina in an Argentine military airplane and eventually sent back to Uruguay (see E/CN.4/1435, paras. 156 and 173); and the case of two Uruguayan children who were allegedly abducted together with their parents in Argentina during that period and who reappeared three months later in Chile (ibid., para. 172). Another case on the Working Group's dockets refers to five Argentine citizens who were allegedly arrested in Peru in 1980 by Peruvian and Argentine military personnel. One of the reported victims was known to be an active member of an association of relatives of disappeared persons (ibid., para. 166).

[16] See E/CN.4/2002/79, para. 246; E/CN.4/2004/58, para. 230; and A/HRC/4/41, para. 318.

[17] See E/CN.4/1995/36, para. 249 and E/CN.4/1996/38 and Corr.1, para. 280.

[18] See, for example, A/HRC/WGEID/100/1, paras. 123 and ff.

repatriated.[19] According to the report of the commission of inquiry on human rights in the Democratic People's Republic of Korea, persons who face forced repatriation to that country may be subjected to torture and arbitrary detention and, in some cases, to rape, enforced disappearance, summary execution and other gross human rights violations.[20] There are also allegations of cooperation between officials of the Democratic People's Republic of Korea and China, as the latter reportedly provide the former with information about persons from the Democratic People's Republic of Korea whom they apprehend.[21]

2. Enforced disappearances occurring during the detention of migrants or the execution of deportation proceedings

20. Many enforced disappearances of migrants occur while they are detained, or during or after expulsion/deportation proceedings.

Detentions

21. In a great number of countries, persons who enter a country in an undocumented manner are subject to immigration detention. It has been documented that, in some instances, migrants are detained administratively on a mandatory basis and often held for periods varying from days to months, and in some cases are even kept in detention indefinitely.[22] The Special Rapporteur on the human rights of migrants expressed concern in 2016 about the extensive use of detention as a border management and deterrence tool against migrants, as it was too often used to prevent migrants' access to justice.[23]

22. In recent years, a number of international bodies have observed an increase in the criminalization of undocumented entry and stay, and have emphasized that crossing the border of a country in an unauthorized manner or without proper documentation or overstaying a permit of stay should not constitute a crime, and detention should be ordered only as a measure of last resort.[24]

23. This question is particularly important in view of the fact that migrants who are detained, in a transit or destination State, under administrative proceedings sometimes disappear. Disappearances can also occur due to a lack of transparency, the fact that migrants are often detained in unofficial detention centres with little or no registration systems, the very limited access of migrants to the justice system and the lack of an independent monitoring mechanism for such detentions.[25] Indeed, it has been recognized that immigration detention is often the most opaque area of public administrations.[26]

24. In addition, there are cases in which non-State actors and authorities are jointly involved in the detention of migrants, without registering them and without letting them have access to lawyers, in addition to other due process guarantees.[27]

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[19] See A/HRC/WGEID/107/1, para. 25.

[20] See A/HRC/25/CRP.1, para. 446.

[21] Ibid., para 448.

[22] See A/HRC/33/67, para. 36.

[23] See A/71/285, para. 87.

[24] See Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, general comment No. 2 (2013) on the rights of migrant workers in an irregular situation and members of their families. See also Inter-American Court of Human Rights, *Vélez Loor v. Panama*, judgment of 23 November 2010; Inter-American Commission on Human Rights, *Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico* (2013), p. 179. See also Recommended Principles and Guidelines on Human Rights at International Borders, in which OHCHR calls on States to establish a presumption against immigration detention in law.

[25] See Association for the Prevention of Torture, International Detention Coalition and Office of the United Nations High Commissioner for Refugees (UNHCR), *Monitoring Immigration Detention: Practical Manual* (Geneva, UNHCR, 2014), p. 20.

[26] Ibid., p. 21. See also A/HRC/27/49/Add.1, para. 54 and A/HRC/19/58/Add.2, para.18.

[27] See United Nations Support Mission in Libya (UNSMIL) and OHCHR, "'Detained and dehumanised': report on human rights abuses against migrants in Libya", 13 December 2016, pp. 1 and 14 ff.

Arbitrary expulsions and pushback

25. The Working Group has often come across instances where migrants are returned or removed either outside legal procedures or in accordance with legal processes and procedures which do not comply with international law, in particular with the human rights principle of non-refoulement or the prohibition of collective expulsion.[28] Such practices can take place at international borders, and following the arrest and detention of the migrant.

26. The Working Group has received several cases of migrants disappearing after having been arrested by the authorities of a destination or transit country and handed over to the authorities of the country of origin.

27. For instance, in 1981, the Working Group received a case in which 26 citizens of El Salvador had been arrested by members of the security forces of Honduras and then disappeared. In five of the cases, the Salvadoran citizens arrested in Honduras were handed over to the Salvadoran authorities. In one of these cases, one Salvadoran refugee, who was living in a refugee camp in Honduras, was forcibly taken back to El Salvador during a raid carried out in the camp by the Salvadoran army.[29]

28. In another case, received by the Working Group in 1996, an Ethiopian refugee was arrested in a refugee camp in Djibouti by members of the Djibouti police and handed over to the Ethiopian authorities, after which he disappeared.[30]

29. Similarly, the Working Group transmitted a communication concerning a Tunisian national who, after having been deported by Canadian immigration authorities and handed to the Tunisian authorities, disappeared shortly after his arrival in Tunisia on 7 September 2005.[31] The case was later clarified.

30. The Working Group has also received cases dealing with the alleged disappearance of Algerian "Harraga" migrants travelling by boat in Tunisian territorial waters on their way to Italy in 2007.[32]

31. In addition, the Working Group has received a number of cases in which "unofficial arrangements" between Governments led to disappearances of migrants during or after expulsion or deportation processes. For instance, in 1981, the Working Group received information on nine cases in which Nicaraguan nationals had reportedly disappeared in Guatemala after being arrested and deprived of their liberty. Some of these prisoners were allegedly transferred to Nicaragua under unofficial arrangements.[33]

32. More recently, in its report following its 2013 visit to Spain, the Working Group expressed concern at claims it had received to the effect that in some cases migrants had been expelled without the relevant legal mechanisms having been followed, which prevented a case-by-case consideration of whether they might have been at risk of enforced disappearance, as required by article 8 (1) of the Declaration on the Protection of All Persons from Enforced Disappearance.[34] While the Government of Spain then provided detailed information regarding measures relating to the detention and expulsion of undocumented migrants and the legal safeguards in force, including Organic Act No. 4/2000 and Act No. 12/2009, to prevent the return of a person if she/he might be at risk of

[28] See International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 22 (1); Human Rights Committee, general comment No. 15 (1986) on the position of aliens under the International Covenant on Civil and Political Rights; and Committee on the Elimination of Racial Discrimination, general recommendation No. 30 (2004) on discrimination against non-citizens. See also Inter-American Court of Human Rights, *Dorzema and others v. Dominican Republic*, judgment of 24 October 2012.

[29] See E/CN.4/1492, para. 155.

[30] See E/CN.4/2006/56 and Corr.1, para. 232.

[31] Ibid., para. 543.

[32] See A/HRC/WGEID/112/1, para. 96.

[33] See E/CN.4/1435, annex XV, p. 3.

[34] See A/HRC/27/49/Add.1, para. 54.

human rights violations, the Working Group noted that domestic law did not make specific reference to enforced disappearance in relation to the principle of non-refoulement.[35]

33. Another related measure which equally contravenes the Declaration is pushing back migrants, or collective expulsions.[36] In its report following its visit to Turkey in 2016, the Working Group expressed concern about information it had received regarding the high number of mass returns of Syrian refugees from Turkey and the use of violence by border guards to prevent Syrian nationals from entering Turkey.[37] Indeed, the situation in the Syrian Arab Republic facilitates the occurrence of enforced disappearances or, at the very least, exposes the refugees returning to the country to greater risks.[38] Consequently, mass returns by Turkish authorities could violate Turkey's obligation of non-refoulement under the Declaration.

3. Enforced disappearances as a possible consequence of smuggling and/or trafficking

34. The Working Group also wishes to address here the issue of disappearances of migrants as a possible consequence of the criminal conduct of mainly non-State actors, notably smugglers and/or traffickers, which can constitute enforced disappearance owing to the involvement — direct or indirect — of official authorities.

35. Sometimes State officials can be smugglers or traffickers themselves, organize the smuggling or trafficking of migrants, facilitate undocumented migration and enable their stay.[39] In addition, the disappearances of smuggled or trafficked migrants also trigger the responsibility of States in circumstances where, as is often the case, smuggling or trafficking is closely linked to corruption or collusion of State officials.[40] The implication of State officials in smuggling processes is usually not related to a specific State policy but rather to corrupt State officials intervening individually in such processes. Indeed, corrupt officials, whether they are law enforcement, justice, immigration, customs or border officials; police officers, soldiers or embassy or consulate employees; or port authorities may be part of the smuggling or trafficking networks. In this context, the corruption of State officials can take many forms, including simply turning a blind eye to such activities or extracting a bribe in exchange for fraudulent documents or for a stamp in a passport, or for allowing entry to or exit from a country. In many instances, corrupt officials take significant percentages of smuggling or trafficking revenues.[41]

36. Many migration policies adopted by States in recent decades, as well as the militarization of borders, have led to an expansion of trafficking and smuggling of migrants. To avoid the restrictive measures adopted by States, many migrants choose clandestine and less safe routes as well as more dangerous means of transportation which are not monitored by State authorities and are often controlled by illegal groups with the cooperation or acquiescence of State agents.[42] The discourse and language used to address the issue of migration and, in particular, to characterize migrants, notably those with undocumented status, associating them with security threats and criminality places them in a situation of increased vulnerability, thus exposing them further to violence and human rights violations, including enforced disappearance.[43]

37. Official collusion and corruption is a critical aspect of the vulnerability of migrants as they allow smugglers and traffickers to operate with little risk of apprehension or

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[35] Ibid.

[36] See A/71/285, para. 14. See also A/HRC/31/35, paras. 24 ff and Recommended Principles and Guidelines.

[37] See A/HRC/33/51/Add.1, para. 55.

[38] Ibid., para. 56; see also A/HRC/24/46, paras. 67-74.

[39] United Nations Office on Drugs and Crime, *Issue Paper: Smuggling of Migrants by Sea* (Vienna, 2011), p. 20.

[40] IOM, *Migrant Smuggling Data and Research: A Global Review of the Emerging Evidence Base* (Geneva, 2016), p. 7.

[41] Ibid., p. 62.

[42] See A/HRC/33/51, para. 67 and A/HRC/31/35. See also UNHCR, *The Sea Route to Europe: The Mediterranean Passage in the Age of Refugees* (Geneva, 2015), p. 7.

[43] See, for example, A/HRC/20/24, paras. 8 and 13.

sanction.[44] In those cases, disappearances of migrants, although carried out by non-State actors, occur with the implicit or explicit authorization, support or acquiescence of individuals operating in the capacity of State officials. In many cases where smuggled migrants are subjected to human rights violations including torture, violence, kidnapping and trauma as well as human trafficking, the perpetrators are able to operate while government officials either turn a blind eye or are actively involved. Therefore, when this leads to the disappearance of the victims, and where there is an implicit or explicit involvement of State officials, enforced disappearances may coincide with trafficking and other human rights violations.[45] There are many widely documented examples of smuggling and trafficking networks around the world operating with the direct or indirect support of official authorities, especially at the local level, as illustrated below.

38. A trafficking network has been identified in Egypt and the Sudan involving smugglers, traffickers and local officials who work together to capture and sell Eritrean migrants.[46] IOM also recently reported that in Eritrea, facilitators providing transportation to the Sudan or Ethiopia that avoids immigration procedures might be government officials.[47]

39. Similarly, there are many reports of State actors involved in smuggling and trafficking in Libya in cooperation with criminal gangs that have established migrant detention centres and control the flow of migrants through the country.[48] According to the United Nations Support Mission in Libya (UNSMIL), officials of State institutions and local officials have participated in the smuggling and trafficking process.[49] When migrant boats are intercepted by the Libyan Coast Guard, migrants are typically transferred to detention facilities or to private houses and farms.[50]

40. Several instances have also been reported in Mexico of migrants being either allegedly captured by federal, state or municipal police or by migration officials and handed over to criminal organizations that detain them for ransom, or abducted on migratory routes jointly by officials and members of criminal organizations.[51] In other instances, criminal organizations have reportedly captured migrants with the direct or indirect support, consent or acquiescence of the State.[52] The disappearance of 72 migrants at the end of March 2011 in Tamaulipas would also fall within this description.[53]

41. Another example which may fit this description concerns the disappearance of Rohingyas (from Rakhine State, Myanmar) and Bangladeshi migrants in Thailand and Malaysia. In 2015, several mass graves were discovered in the border areas between Thailand and Malaysia. It was reported that some of the victims had been forced by traffickers to embark on boats leaving from Myanmar and Bangladesh. Earlier reports were published to the effect that Myanmar State security forces were complicit in and profiting from the increasingly lucrative maritime human trafficking and smuggling of Rohingya.[54]

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[44] Contribution by the Regional Mixed Migration Secretariat to the expert meeting held in Seoul in February 2017.

[45] Ibid.

[46] IOM, *Fatal Journeys*, p. 121.

[47] IOM, *Migrant Smuggling Data and Research*, p. 63.

[48] Ibid., p. 91.

[49] UNSMIL and OHCHR, "'Detained and dehumanised'", pp. 12 and 19.

[50] Ibid., p. 19.

[51] Comisión Nacional de los Derechos Humanos, *2009 Informe de Actividades*, pp. 14, 26 and 30 and *2011 Informe de Actividades*, p. 28. See also CMW/C/MEX/CO/2, paras. 29 and 49.

[52] Comisión Nacional de los Derechos Humanos, *2009 Informe de Actividades*, pp. 15, 26, 30 and 38 and *2011 Informe de Actividades*, pp. 27, 29 and 33. See also Fundación para la Justicia, "Disappeared migrants", p. 7.

[53] Seventeen police officers from the municipality of San Fernando were said to have provided protection and assistance to the organized crime group known as "Los Zetas". See Inter-American Commission on Human Rights, *Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico*, p. 81. See also Fundación para la Justicia, "Disappeared migrants", p. 5.

[54] Contribution by the Regional Mixed Migration Secretariat, referring to Fortify Rights, "Myanmar: authorities complicit in Rohingya trafficking, smuggling", November 2014. Available at

42. Finally, systematic situations of impunity regarding the abduction and detention of migrants by private actors, including smugglers or traffickers, could be considered in certain circumstances as a form of acquiescence and, as such, constitute enforced disappearance.[55]

43. In the cases mentioned in the present section, there is little doubt that should a person disappear as a consequence of being smuggled or trafficked, the participation — either direct or indirect — of State officials in these criminal activities renders the disappearance an enforced disappearance for which the State is internationally responsible.

Investigation of enforced disappearances of migrants (migrants abandoned at sea/mass graves)

44. Many situations lead to the disappearance of migrants at the hands of smugglers. For instance, migrants leaving countries by boat are often abandoned by smugglers off the coast, sometimes in situations where they are initially prevented by authorities from approaching or disembarking. As a consequence, stranded migrants drown at sea, notably in the Mediterranean, and die or remain missing on land routes through deserts. While these situations are not necessarily enforced disappearances per se as defined in the Declaration, they may trigger State responsibility as they may constitute practices tantamount to disappearances or may facilitate disappearances because they render the finding or identification of missing persons very difficult.

45. For instance, mass graves unearthed along the borders between Thailand, Malaysia and Indonesia contained the remains of hundreds of migrants.[56] Similarly, in Libya, bodies have allegedly been dumped and abandoned by smugglers.[57] In southern Tunisia, bodies were found washed ashore and were trucked directly to mass graves, without being identified.[58] When bodies are found on land or at sea, they often carry no identification documents, have no personal effects or have lost physical attributes because of decomposition. Documents are sometimes taken by smugglers or destroyed to avoid detection.[59] Consequently, those bodies may never be identified, making it impossible to ascertain the whereabouts of missing or potentially disappeared migrants.

C. Factors that contribute to the enforced disappearances of migrants

46. As mentioned in the preliminary report presented on this issue[60] and as highlighted in some of the Working Group's country visit reports,[61] a number of factors may contribute to the enforced disappearances of migrants. These include situations which increase the vulnerability of migrants, such as the contexts of conflict and violence to which they are often exposed; the multiple forms of discrimination and socioeconomic difficulties that they suffer; the lack of remedies; the prevailing impunity; the impact of inappropriate migratory, security and counter-terrorism policies; and the lack of available data and statistics thereon.

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www.fortifyrights.org/publication-20141107.html. See also Kathleen Newland, *Irregular Maritime Migration in the Bay of Bengal: The Challenges of Protection, Management and Cooperation. Issue in Brief*, Issue No. 13 (IOM and Migration Policy Institute, July 2015). Available at http://publications.iom.int/system/files/pdf/mpi-iom_brief_no_13.pdf.

[55] See general comment on the definition of enforced disappearance adopted by the Working Group (A/HRC/7/2 and Corr. 1 and 2). See also A/HRC/16/48/Add.3 and Corr.1, paras. 21, 25 and 26 and A/HRC/30/38/Add.4, para. 31.

[56] See, for example, IOM, *Fatal Journeys*, Volume 2, *Identification and Tracing of Dead and Missing Migrants* (Geneva, 2016), p. 20.

[57] Ibid., p. 33.

[58] Ibid.

[59] Ibid., p. 36.

[60] See A/HRC/33/51, paras. 46 ff.

[61] See A/HRC/19/58/Add.2, para. 69.

1. Conflict and violence

47. Migrants often disappear in the context of conflict or violence. This may happen during their flight from a country in conflict,[62] or where there is widespread violence or insecurity, or when they are unlawfully returned to their country of origin while attempting to reach a transit or destination country.[63] Those who are migrating in search of a disappeared loved one may end up being disappeared themselves by the same authorities, as a form of reprisal or to silence them. The same may apply to those who are left behind.[64] In addition, the disappearance of individuals while in detention during times of violence and/or conflict may be facilitated by lax and ill-functioning criminal justice systems.[65] Women are in a situation of particular vulnerability during times of conflict, including when they are fleeing from war or violence. During these times, they may be targeted and forcibly disappeared or suffer other forms of gender-based violence.[66]

2. Socioeconomic factors

48. The Working Group has observed that the lack of effective protection of certain economic, social and cultural rights can be a contributing factor to enforced disappearances, insofar as those who live in poverty and lack the enjoyment of a number of economic, social and cultural rights are more vulnerable to enforced disappearances.[67] In addition, effective protection schemes and judicial remedies are often not available for those who are undocumented.

49. Family members who are left behind after the disappearance of a relative might migrate to search for their loved one, or be forced to do so due to social stigmatization. In particular, women whose husbands have disappeared often are ostracized in the community because their husbands have been falsely accused of crimes, or because people fear associating with someone who has been the target of an enforced disappearance.[68] Also, as they can more easily be harassed or attacked (not only by the authorities but also by others), they may migrate to escape insecurity. Fear of repercussions by authorities or the people responsible for the enforced disappearance may also lead the family to relocate to a more secure location.[69]

3. Impunity

50. Despite the large number of serious crimes and human rights violations committed in the context of migration, including in large movements,[70] inter alia enforced disappearances, the Working Group has not documented any instances in which States or non-State actors have been held accountable. This situation creates a favourable context for the perpetuation of these crimes and violations.

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[62] See A/HRC/33/51/Add.1, para. 14.

[63] Ibid., paras. 55-56. See also A/HRC/25/CRP.1, paras. 446 and 452-453.

[64] In its report, the commission of inquiry on human rights in Eritrea observed: "Witnesses also explained that family members of those who have left Eritrea are required to pay a substantial fine, and that those unable to pay the fines are imprisoned." See A/HRC/32/CRP.1, para. 279.

[65] UNSMIL noted in a 2016 report that in Libya, migrants are held arbitrarily in detention centres run mostly by the Department for Combating Illegal Migration. They are brought to the centres, where there is no formal registration, no legal process and no access to lawyers or judicial authorities. Migrants are also held in unofficial places of detention while transiting through Libya, including in detention centres run by armed groups, and in "connection houses" — places where smugglers and traffickers hold migrants during transit before transfer onto the next location. See UNSMIL and OHCHR, "'Detained and dehumanised'", pp. 1 and 15.

[66] See the general comment on women affected by enforced disappearances adopted by the Working Group (A/HRC/WGEID/8/2, para. 7). See also UNSMIL and OHCHR, "'Detained and dehumanised'", p. 12: "Women are often the most exposed, amidst numerous and consistent reports of rape and other sexual violence."

[67] See A/HRC/30/38/Add.5, para. 8; see also A/HRC/19/58/Add.2, para. 69.

[68] See A/HRC/30/38/Add.5, para. 23.

[69] Ibid., para. 28. See also Inter-American Court of Human Rights, *Molina-Theissen v. Guatemala*, judgment (merits) of 4 May 2004, para. 40 (13).

[70] See A/70/59.

51. Impunity and lack of clarification of the facts are among the factors that most affect the relatives of the disappeared. Comparative experience has shown that attention to their claims and the building of social consensus are key in advancing mechanisms to achieve investigation, prosecution and punishment of those who carry out enforced disappearances. However, in the case of the disappearance of migrants, the claims and participation of relatives living in the country of origin are hampered by both distance and lack of cooperation on the part of the authorities of the country where the disappearance occurred.

4. Discrimination

52. Migrants are often the object of multiple forms of discrimination based on grounds such as their race, national origin, language, religion, gender, age and/or sexual orientation.[71] These multiple forms of discrimination may accumulate, or intersect, to constitute a unique and distinct form of discrimination, referred to as intersectional discrimination.[72] The discourse and language used to address the issue of migration and, in particular, to associate migrants, notably those with undocumented status, with security threats and/or criminality places them in a situation of increased vulnerability, which in turn further exposes them to violence and to becoming victims of human rights violations.[73] In particular, the multiple forms of discrimination which may be triggered by the use of criminal measures to manage migration may, in extreme cases, violate their right to life.[74]

53. Ethnic or other profiling of migrants is another prominent manifestation of the stigmatization of and discrimination against migrants,[75] one of whose consequences is the disproportionate use of both criminal and administrative detention.

5. State migratory and counter-terrorism policies

54. As indicated above,[76] many migration policies adopted by States in the last decades, as well as the militarization of borders, have led to an expansion of trafficking and smuggling of migrants.[77] To avoid the restrictive measures adopted by States, many migrants choose clandestine and less safe roads, which are not monitored by State authorities and are often controlled by illegal groups with the cooperation or acquiescence of State agents. Migrants entering a country in an undocumented manner are more likely to become victims of enforced disappearances owing to the fact that they are often not registered and thus, to some extent, are "invisible". Increasingly strict migration policies worsen the situation as migrants end up taking the most dangerous routes, at the mercy of unscrupulous smugglers, and/or becoming trapped in trafficking networks. As smugglers and traffickers can more easily operate in areas with limited rule of law, they are not often prosecuted for their crimes; this impunity itself contributes to the increased likelihood of being disappeared.[78]

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[71] See, generally, Inter-American Court of Human Rights, *Juridical Condition and Rights of Undocumented Migrants*, Advisory Opinion OC-18/03 of 17 September 2003. See also Committee on the Elimination of Discrimination against Women, general recommendation No. 26 (2008) on women migrant workers. See also Inter-American Commission on Human Rights, *Human Mobility: Inter-American Standards* (2015), p. 1[9].

[72] See, for example, E/CN.4/2005/85 and Corr.1.

[73] See, for example, A/HRC/20/24, paras. 8 and 13. See also OHCHR and Global Migration Group Working Group on Human Rights and Gender Equality, draft principles and guidelines on the human rights protection of migrants in vulnerable situations within large and/or mixed movements, available at www.ohchr.org/EN/Issues/Migration/Pages/Draftsforcomments.aspx.

[74] See A/65/222, para. 19.

[75] Ibid., paras. 31 ff.

[76] See, in particular, para. 36.

[77] As indicated by the Special Rapporteur on the human rights of migrants, research studies have already demonstrated that many enforcement mechanisms designed to prevent irregular or unauthorized migration, including harsh policies of interception, carrier sanctions and immigration control activities, may themselves be responsible for violence and abuse and may have the side effect of encouraging the expansion of smuggling and trafficking networks (see A/65/222, para. 15).

[78] See also paras. 50-51 above.

55. The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, in his report to the General Assembly in 2016, assessed the impact of counter-terrorism measures on the human rights of migrants and refugees. In particular, the Special Rapporteur noted that asylum and migration policies that were restrictive or that violated human rights could have a counterproductive effect on the efforts of States to counter terrorism by creating more undocumented migration and increasing violations of the human rights of migrants and refugees.[79] Measures taken to address the threat posed by terrorism which do not comply with international human rights law may thus increase the risk of migrants becoming victims of such human rights violations as enforced disappearances, including by States failing to respect the non-refoulement principle.

6. Lack of statistical data

56. A further element that renders migrants more vulnerable to enforced disappearance is the absence of reliable data and statistics on the phenomenon. This may be due to the fact that it is difficult to gather accurate information and statistics given that a large number of the migrants who disappear are undocumented and travel through smuggling networks. However, the lack of accurate data and statistics is also due to insufficient cooperation and coordination among States and insufficient political will at the national, regional and international levels to tackle this issue seriously.

D. State obligations in the context of the enforced disappearance of migrants

57. The Working Group has identified a number of obligations that States bear under international law to prevent, punish and remedy enforced disappearances of migrants. The overarching rule is the absolute prohibition of enforced disappearance, as encompassed by article 2 of the Declaration, which obviously applies to enforced disappearances in the context of migration as well. There are in addition specific obligations resulting from the specific characteristics of the migratory phenomenon in the areas of prevention, search, criminalization/investigation, reparation and international cooperation, as identified in the present report.

1. Prevention of enforced disappearance of migrants

58. States have an obligation to adopt effective legislative, administrative, judicial and other measures, including migratory policy-related measures, to prevent and terminate acts of enforced disappearances of migrants in their territory.[80]

Non-refoulement and pushback

59. Among the main obligations in this category is the obligation of States not to expel, return (refouler) or extradite a migrant to another State where there are substantial grounds to believe that she/he would be in danger of enforced disappearance.[81] As specified in article 8 (2) of the Declaration, for the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights. The Working Group has reiterated the importance of this prohibition in the context of its country visit reports, notably in the context of the current migratory flows following the humanitarian crisis in the Syrian Arab Republic.[82]

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[79] See A/71/384, para. 53.

[80] See article 3 of the Declaration.

[81] Article 8 (1) of the Declaration. See also article 16 of the International Convention for the Protection of All Persons from Enforced Disappearance.

[82] In the report on its visit to Turkey in 2016, for instance, the Working Group expressed serious concern about the information received of a high number of mass returns of Syrian refugees from

60. The Working Group recalls that all returns of migrants must be formally documented and undertaken in accordance with the law in order to avoid disappearances during those processes, including temporary or short-term disappearances.[83] Likewise, the practice of pushing back or collective expulsion of migrants does not comply with the international obligation of non-refoulement and may lead to enforced disappearances.

61. The Working Group further emphasizes that enforced disappearance is a crime which entails multiple human rights violations and constitutes in itself a form of torture or inhuman treatment, not only with regard to the disappeared person, but also to her/his relatives, because of the anxiety and anguish they suffer as a result of the disappearance of their loved one. Thus, enforced disappearances should be considered as among the risks of torture to which States should give consideration in their decisions on whether to remove a person from their territory, and take them into account in applying the principle of non-refoulement. Furthermore, the element of previous cases of enforced disappearances of the person's family or political, social or ethnic entourage should also be taken into account in the context of the non-refoulement principle.[84]

Deprivation of liberty

62. A number of State obligations in relation to the prevention of enforced disappearance of migrants concern the category of those who are for some reasons deprived of liberty. Migrants should not be deprived of liberty for undocumented entry into a country.[85] Adults only should be detained as a measure of last resort,[86] and any migrant who is detained in transit or at the destination for violation of provisions relating to migration shall be held separately from convicted persons or persons detained pending trial, and have the right to obtain information as to the grounds of detention and accessible judicial remedies, as well as the right to challenge the legality of the detention.[87] In addition, migrants deprived of liberty must be held in an officially recognized place of detention and their detention must be formally registered, including with accurate information on the reasons for their detention and the place or places of detention.[88] An official, up-to-date register of all migrants deprived of their liberty shall be maintained in every place of detention. These provisions are equally applicable to all migrants irrespective of the regularity of their migratory status.

63. Similarly, all returns of migrants must be formally documented and undertaken in accordance with the law in order to avoid disappearances during those processes, including temporary disappearances. Accordingly, all migrants deprived of liberty must be released in a manner permitting reliable verification that they have actually been released and, further, have been released in conditions in which their physical integrity and ability to fully exercise their rights are assured.[89]

Turkey, notably since January 2016, and about the allegations of the use of violence by border guards, including the use of live ammunition, to prevent Syrian nationals, including children, from entering Turkey from the Syrian Arab Republic. See A/HRC/33/51/Add.1, paras. 55-56. See also para. 33 above.

[83] The Working Group has considered that there is no time limit, no matter how short, for an enforced disappearance to occur. See, for instance, A/HRC/30/38, para. 102.

[84] See www.ohchr.org/Documents/HRBodies/CAT/GC/Article3/WGEIDcomments.pdf; http://www.ohchr.org/Documents/HRBodies/CAT/GC/Article3/WGEIDcomments.pdf.

[85] See paragraphs 21 ff above.

[86] On the principle of non-detention of migrant children, see UNHCR, *Detention Guidelines: Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (Geneva, 2012) and the *Global Strategy — Beyond Detention 2014-2019*, available at http://www.unhcr.org/detention.html.

[87] Article 17 of the Convention on Migrant Workers.

[88] See article 10 of the Declaration. See also article 17 (1) of the International Convention on the Protection of All Persons from Enforced Disappearance.

[89] See article 11 of the Declaration.

64. Migrant detainees should also be allowed to communicate with their relatives and their lawyers or representatives, and should be informed of their right to communicate with the consular authorities of their country of origin.[90]

Other preventive measures

65. Other preventive measures may be envisaged in this context, notably those specifically tailored to address or mitigate factors that may increase the risk of enforced disappearances of migrants. For instance, States should take all possible measures to combat criminal organizations which abuse or exploit migrants, notably trafficking networks, and adequately investigate any allegation of involvement, collusion or acquiescence of State authorities in these criminal acts, which may end in the disappearance of migrants.[91]

66. As mentioned above, States should also avoid adopting excessively rigid and strict migration policies, as they encourage the use of less travelled and more dangerous routes.[92] At the same time, newly identified migratory routes — either by land or by sea — should be better monitored in order to save lives and avoid as much as feasible the disappearances of migrants during their journey.

2. Search for disappeared migrants

67. The State in which any person has disappeared, including migrants, regardless of their status, has the obligation to make the necessary efforts to search for and locate her/him immediately, in fulfilment of the recognized right to know the truth that is due to the relatives of the disappeared and to the society as a whole. In case of presumption of death, the State must search for the remains, identify them and return them to the relatives, with due respect for cultural customs.[93]

68. For the search for disappeared migrants to be effective, the State must reveal all its forensic investigative resources and compile all relevant ante-mortem information, including the genetic information of the relatives, and incorporate it into a centralized database.

69. States shall also investigate whether clandestine graves or other places where bodies may be concealed may exist in migratory transit areas and establish a register of found corpses, documenting the circumstances of the discovery. Should an exhumation be necessary, the international standards on the matter must be respected.

3. Obligation to investigate, criminalize and prosecute

70. The Working Group has always underlined that a potential enforced disappearance needs to be investigated as such from the outset and cannot be excluded a priori.[94] This is particularly important given that the first moments after an enforced disappearance are essential to establishing the facts, identifying the perpetrators and determining the fate and whereabouts of the disappeared. There is obviously a clear lack of sufficient and qualitative investigations related to this matter, which provokes a clear protection gap. In addition, States also have the obligation to criminalize all acts of enforced disappearance, including

[90] See article 17 (2) (d) of the International Convention on the Protection of All Persons from Enforced Disappearance and article 16 (7) of the Convention on Migrant Workers.

[91] See A/HRC/33/51/Add.1, para. 67.

[92] See paragraphs 36, 46 and 54-55 above.

[93] A good example in this respect is the recent adoption of the Migration Code in Guatemala, which includes the creation of a procedure to assist families of people reported as missing as a result of migration, including the obligation to establish a search procedure, facilitate transfers, repatriate remains, prohibit cremation of migrants' remains and facilitate search mechanisms. See www.oas.org/en/iachr/media_center/PReleases/2017/079.asp.

[94] See, for instance, A/HRC/19/58/Add.2, para. 21.

enforced disappearances of migrants, which should be punished by appropriate penalties, taking into account their extreme seriousness.[95]

71. All States should take all appropriate action to bring to justice all persons presumed responsible for an act of enforced disappearance of migrants when they are found to be within the States' jurisdiction or under their control, unless they have been extradited to another State wishing to exercise jurisdiction.[96]

4. Obligation to protect and to make remedies available for migrant victims of enforced disappearances and their families

72. The fact that migrants, by definition, are in a State other than the State of which they hold citizenship by itself may limit their access to appropriate remedies, as they may be unaware of their rights, unfamiliar with the legal system, face language barriers and are often confronted with discriminatory attitudes. In addition, migrants with undocumented status may avoid seeking help from the police or any other institution out of fear of deportation, detention or other negative consequence if they make themselves known to the authorities.

73. States must ensure a prompt and effective judicial remedy as a means of determining the whereabouts or state of health of migrants whose whereabouts are unknown, including when they are deprived of their liberty.[97]

74. International law also provides that migrants, including those in an undocumented situation, shall have the right to equality with nationals of the State concerned before the courts and tribunals,[98] as well as the right to have recourse to the protection and assistance of the consular or diplomatic authorities of their State of origin if their rights are violated.[99] These rights also apply to members of their families, who have the right to know the truth regarding the circumstances of the enforced disappearance of their loved one, the progress and results of the investigation and the fate of the disappeared person.[100] The Declaration provides that any person having knowledge that another person has been subjected to enforced disappearance has the right to complain to a competent and independent State authority and to have that complaint promptly, thoroughly and impartially investigated.[101] For instance, if a mass grave is discovered, an appropriate investigation should be promptly initiated and no measures that could derail or delay the investigation should be taken.

75. The Declaration also provides that the victims of acts of enforced disappearance and their families shall obtain redress and shall have the right to adequate compensation, including the means for as complete a rehabilitation as possible. In the event of the death of the victim as a result of an act of enforced disappearance, her/his dependents shall also be entitled to compensation.[102] This applies equally to family members of migrants who have been forcibly disappeared.

76. In the framework of the right to a remedy and reparation, it is also essential that each State — origin, transit and destination — take the necessary measures to establish its competence to exercise jurisdiction over the offence of enforced disappearances of migrants in accordance with the applicable international law standards.[103]

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[95] See article 4 of the Declaration.

[96] Article 14 of the Declaration. See also articles 9 and 11 of the International Convention on the Protection of All Persons from Enforced Disappearance.

[97] See article 9 of the Declaration.

[98] Article 14 of the International Covenant on Civil and Political Rights and article 18 (1) of the Convention on Migrant Workers.

[99] Article 23 of the Convention on Migrant Workers.

[100] Article 24 (2) of the International Convention on the Protection of All Persons from Enforced Disappearance.

[101] Article 13 (1) of the Declaration.

[102] Article 19 of the Declaration.

[103] See also paragraph 71 above.

5. Obligation to cooperate among States

77. The suffering of families is aggravated in cases where the person disappears in the context of migration. The remoteness and lack of contact with the authorities of the country where the person has disappeared, among many reasons, make it difficult for the family to participate in the investigation, a circumstance that affects not only their rights but also the efficacy of the search. In this respect, in cases of enforced disappearance of migrants it is essential that all investigative efforts — both for the search and for prosecution — be carried out with the cooperation of the authorities of all States involved,[104] as is normally the case for all criminal acts having a transnational character.[105]

78. States must ensure through their institutions, in particular their diplomatic missions, that the families of the disappeared have the effective possibility of being informed of and to participate in the progress of the investigations, without prejudice to the country where they reside. Likewise, States must cooperate with each other to enable the collection of ante-mortem information necessary for the search for the person.[106]

79. In relation to children disappeared during migration, including those whose identities may have been changed, States "shall devote their efforts to the search for and identification of such children and to the restitution of the children to their families of origin" and, to this end, they must conclude cooperation agreements with the other States involved.[107]

II. Conclusion and recommendations

80. **The phenomenon of enforced disappearance of migrants is a modern-day reality and should not be ignored or underestimated. The increasingly precarious movements of migrants, including through long and perilous journeys associated, among other things, with the often increasingly rigid migratory policies of States focused on deterrence, have created a situation which exposes migrants to heightened risks of becoming victims of human rights violations, including enforced disappearances.**

81. **As outlined in the present report, there is a direct link between enforced disappearance and migration, either because individuals migrate as a consequence of the threat or risk of being subjected to enforced disappearances in their country, or because they disappear during their migratory journey or in the country of destination. This may occur either as a result of abduction for political or other reasons, or in the context of detention or deportation processes, or as a consequence of smuggling and/or trafficking. However, States and the international community as a whole do not seem to be devoting the necessary attention to this issue. In addition, owing to both its nature and its transnational character, States are turning a blind eye and prefer to transfer the blame elsewhere, be it to another State or to a criminal group.**

82. **Where the disappearances of migrants are carried out primarily by non-State actors but with the direct or indirect involvement of State authorities, those acts would clearly be characterized as enforced disappearances. There are also other cases**

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[104] Article 2.2 of the Declaration establishes that "States shall act at the national and regional levels and in cooperation with the United Nations to contribute by all means to the prevention and eradication of enforced disappearance." See also article 15 of the International Convention on the Protection of All Persons from Enforced Disappearance.

[105] See CED/C/MEX/CO/1, paras. 23 and 24, in which the Committee on Enforced Disappearances expressed concern about cases of enforced disappearances of migrants and recommended that Mexico take a number of measures in conjunction with countries of origin and countries of destination, and with input from victims and civil society.

[106] Ibid., para. 24. On the issue of international cooperation mechanisms, see http://dof.gob.mx/nota_detalle.php?codigo=5420681&fecha=18/12/2015.

[107] Article 20 (1) and (4) of the Declaration. See also article 25 (3) of the International Convention on the Protection of All Persons from Enforced Disappearance.

in which migrants disappear as an involuntary but direct consequence of the actions of the State, for instance in the case of pushback, at land or at sea. While these may not, strictly speaking, be enforced disappearances, they may nevertheless equally trigger State responsibility in the context of the Declaration on the Protection of All Persons from Enforced Disappearance.

83. **Thus, in view of the gravity and complexity of this phenomenon, it is essential that each State take this problem seriously and urgently strengthen measures to prevent and combat it at the national level. In addition, given its transnational character, States should reinforce cooperation with other States as well as with relevant international organizations at the regional and global levels.**

84. **In the light of the foregoing, the Working Group makes the following recommendations to States.**

A. General

Migration as a consequence of enforced disappearance

85. **States should consider the risk or threat of being subjected to enforced disappearance as a form of persecution falling within the scope of the principle of non-refoulement and grant refugee status to persons who migrate to flee from such conduct, while taking all necessary measures to ensure that they are not the subject of refoulement.**

Enforced disappearance of migrants

86. **States should:**

(a) **Gather, compile and systematize all the information in relation to all individuals who go missing in, or transiting through, their countries. This information should also be systematically shared with bordering countries as well as with relevant international and/or regional organizations;**

(b) **Intensify cooperation — bilateral and multilateral — with other States in the areas of identification, search, data collection, prevention, investigation and prosecution.**

B. Prevention

87. **In accordance with article 8 of the Declaration, States should prohibit, in both legislation and practice:**

(a) **The expulsion, return (refoulement) or extradition of migrants to another State where there are substantial grounds to believe that they would be in danger of enforced disappearance. Any return must be the subject of careful individual assessment and follow due process, including the right to challenge the decision to expel/return. For the purpose of determining whether there are grounds for such challenges, the competent authorities should take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights, in accordance with article 8 (2) of the Declaration;**

(b) **The pushback of migrants to any country where they would be in danger of enforced disappearance.**

88. **In this connection, States should also:**

(a) **Carefully consider, when designing them, the impact that migration regulations, policies and practices may have, and in particular assess the possible consequence of compelling migrants to resort to smuggling networks and thereby falling prey to trafficking networks, thus contributing to heightened risks of becoming victims of human rights violations, including enforced disappearances;**

(b) **Better monitor newly identified migratory routes — both by land and by sea — with a view to saving lives and upholding human rights in order to avoid as much as possible the disappearances of migrants during their journey;**

(c) **Take all possible measures to sanction criminal organizations which abuse or exploit migrants, notably trafficking networks, and adequately investigate any allegation of involvement, collusion or acquiescence of State authorities in these criminal acts, which may end in the disappearance of migrants;**

(d) **Strive to end immigration detention and never detain migrant children based on their status or that of their parents. If detention of adult migrants is absolutely necessary as a measure of last resort, proportionate and justified in law, States should hold migrants deprived of liberty in an officially recognized place of detention and make sure that their detention is formally registered, including with accurate information on their detention and place or places of detention, and independently monitored;**

(e) **In all circumstances allow migrant detainees to communicate with their relatives and lawyers or representatives, and always inform them of their right to communicate with the consular authorities of their country of origin;**

(f) **Formally document — and monitor, when possible — all returns of migrants and ensure that they are carried out in accordance with international standards in order to avoid disappearances during those processes, including temporary disappearances;**

(g) **When deprived of liberty, release all migrants in a manner permitting reliable verification that they have actually been released and, further, have been released in conditions in which their physical integrity and ability to fully exercise their rights are assured.**

C. Search for disappeared migrants

89. **States should:**

(a) **Take all necessary measures to search for and locate disappeared migrants by using all means at their disposal, including forensic investigative resources, and incorporate ante-mortem information in a centralized database;**

(b) **Investigate whether clandestine graves or other places where bodies may be concealed may exist in migratory transit areas and establish a register of found corpses, documenting the circumstances of the discovery;**

(c) **Respect international standards for all exhumations of mass graves of migrants and the identification processes undertaken thereafter;**

(d) **Consider facilitating, including by the issuance of visas, the arrival of relatives of the disappeared implicated in the search for their loved ones.**

D. Investigation, criminalization and prosecution

90. **States should:**

(a) **Investigate all cases of potential enforced disappearance as such from the outset and not exclude, a priori, the fact that they may in fact be enforced disappearances;**

(b) **Carry out all investigative efforts with the cooperation of the authorities of all States involved, as is normally the case for all criminal acts having a transnational character;**

(c) **Criminalize all acts of enforced disappearance, including enforced disappearances of migrants, which should be punished by appropriate penalties, taking into account their extreme seriousness;**

(d) **Take any appropriate action to bring to justice all persons presumed responsible for an act of enforced disappearance of migrants when they are found to be within their jurisdiction or under their control, unless those persons have been extradited to another State wishing to exercise jurisdiction.**

E. Protection and right to an effective remedy

91. **States should:**

(a) **Ensure a prompt and effective judicial remedy as a means of determining the whereabouts or state of health of migrants whose whereabouts are unknown;**

(b) **Ensure the right of migrants to have recourse — with their informed consent — to the protection and assistance of the consular or diplomatic authorities of their State of origin if their rights are violated, including the right of the families of disappeared migrants to be assisted in the search for their whereabouts;**

(c) **Promptly initiate an appropriate investigation if a mass grave of migrants is discovered and refrain from taking any measures that could derail or delay the investigation;**

(d) **Provide redress and ensure the right to adequate compensation, including the means for as complete a rehabilitation as possible, for all victims. In the event of the death of a migrant as a result of an act of enforced disappearance, the family members should also be entitled to compensation.**

F. International cooperation

92. **Given the transnational nature of the enforced disappearance of migrants, States should carry out all investigative efforts, both for the search for the migrants and for the prosecution of those presumed responsible, duly cooperating with the authorities of all States involved as well as with relevant international organizations.**